JULIE GUTMAN DICKINSON
HECTOR DE HARO
BUSH GOTTLIEB, A Law Corporation
801 North Brand Boulevard, Suite 950
Glendale, California 91203
Telephone: (818) 973-3200
Facsimile: (818) 973-3201
jgutmandickinson@bushgottlieb.com
hdeharo@bushgottlieb.com

Attorneys for JEANNIE EDGE, Charging Party

BEFORE THE NATIONAL LABOR RELATIONS BOARD

VELOX EXPRESS, INC., Employer and JEANNIE EDGE, Charging Party	**Case Nos. 15-CA-184006**

CHARGING PARTY'S SUPPLEMENTAL BRIEF IN RESPONSE TO BOARD'S NOTICE AND INVITATION TO FILE BRIEFS

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I. Statement of the Case

Jeannie Edge ("Ms. Edge"), an individual Charging Party, filed an unfair labor practice ("ULP") charge against Velox Express, Inc. ("Velox" or "Respondent") on September 12, 2016. A complaint issued on April 13, 2017, and a hearing was held on July 24-25, 2017. Thereafter, on September 25, 2017, Administrative Law Judge Arthur J. Amchan issued a Decision and Order (ALJD), finding that Velox violated the Act by: (1) discharging Ms. Edge; (2) maintaining an unlawful non-disparagement policy; and (3) misclassifying Ms. Edge and other drivers/couriers as independent contractors. After the parties filed exceptions and briefs, the National Labor Relations Board (the "Board") invited additional briefing on the following question:

> Under what circumstances, if any, should the Board deem an employer's act of misclassifying statutory employees as independent contractors a violation of Section 8(a)(1) of the Act?

This Brief is submitted as Charging Party's supplemental brief addressing the Board's inquiry. The first portion of this Brief contains the legal argument from newly retained counsel for Ms. Edge. The second portion, Attachment A, is a direct response to the Board from Ms. Edge, which she began drafting before retaining counsel.

II. Introduction

At its core, the answer to the Board's question is simple: misclassification itself is a violation of Section 8(a)(1) because purporting to classify workers as independent contractors, when in fact they are employees under the Act, inherently interferes, restrains, and coerces workers in the exercise of their Section 7 rights by effectively telling the workers that they are not employees, and therefore have no rights or protections under the Act. As Ms. Edge states in her letter brief:

> By telling workers that they are an IC [independent contractor] (orally or in writing),they are being told they have no rights or protections under the Act, by the very definition of an IC. What better way to keep them in line and "under control" if they have already been told they have no rights because they are an IC? What better way to constrain their exercising their Section 7 rights? Just take them away up front – call them an IC. Attachment A at 1.

Thousands of employers across the country interfere with the exercise of Section 7 rights by misclassifying individuals who are actually employees. The Board must attack this interference head on to ensure that the Act addresses this contemporary workplace reality, and to affirm that employers cannot divorce employees from the Act merely by asserting that those employees are independent contractors while continuing to engage in an employee-employer relationship. It is particularly critical for the Board to affirm this violation now, as misclassification becomes more prevalent in both long established and newly emerging sectors.

Respondent and Amici argue in their briefs (Briefs in Opposition) that finding a violation would be a drastic departure from Board precedent, would violate free speech, and would deter employers from using independent contractors altogether. These arguments lack merit, and should be rejected. For the reasons set forth below, Charging Party urges the Board to uphold the decision of ALJ Amchan, find that the act of misclassification itself is a violation of Section 8(a)(1), and order Velox to cease and desist misclassifying its drivers, and to reclassify them as employees. Alternatively, if the Board declines to find that misclassification itself is a violation, the Board should find that misclassification violates Section 8(a)(1) when, as here, it occurs in the context of other ULPs by the Employer.[1] Finally, at absolute minimum, the Board should find that a remedy that includes reclassification and a cease and desist order is necessary and appropriate in order to fully remedy other ULPs where, as here, the ALJ has properly found that the Employer engaged in unfair labor practices against drivers misclassified as independent contractors.

[1] Alternatively, as the GC argues in its brief, filed April 25, 2018, the Board should find that here, where Respondent actively used misclassification to interfere with Section 7 rights, it violates Section 8(a)(1) of the Act.

III. Argument

A. Applicable Law Supports a Finding that Misclassification Itself Violates Section 8(a)(1) of the Act

Although the Briefs in Opposition paint this case as the harbinger of the end of the industrial world, this apocalyptic hyperbole is not supported by the statute, case law, or the facts of the instant case. This case involves an easily answerable, narrow question with minimal to no effect on legitimate economic activity—its only effect will be ensuring that misclassified workers receive the protections and rights that they are entitled to under Section 7 of the Act.

1. Text of the Act Makes Misclassification a Violation of Section 8(a)(1)

The interference with Section 7 rights that arises from misclassifying an employee as an independent contractor is so fundamental that the very text of the Act provides complete support for finding a violation[2] Section 8(a)(1) makes it unlawful for an Employer "to interfere with, restrain, or coerce *employees* in the exercise of" their Section 7 rights. 29 USC § 158(a)(1) (emphasis added). Similarly, Section 7 provides that "*Employees* shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection . . . ." *Id.* at § 157 (emphasis added). Thus, the Act itself limits its protections to employees while excluding from the definition of employee "any individual having the status of an independent contractor." 29 USC § 152(3).

This means that independent contractors have no §7 rights at all. *See*, *D.J.W. Cartage*, 227 NLRB 1757, 1761 (1977) (refusal to return driver to work "clearly violated the Act, unless, . . . he was an independent contractor, not subject to the Act's coverage."); *OS Transport, LLC*, 358 NLRB 1048, 1049 (2012) (violation where sham independent contractor agreements "purported to strip

[2] Despite Respondent's focus on it, it is irrelevant that the General Counsel has withdrawn the memorandum in *Pacific 9 Transportation* because that memorandum did not form the basis of this violation.

[employees] of their employee status and their concomitant rights under the Act.").[3] Even the NLRB's website informs interested workers that independent contractors are not protected.[4]

This binary divide between the rights afforded to an employee and denied to an independent contractor under the Act demonstrates the coercive effect of misclassification. Employers who misclassify employees as independent contractors effectively conceal those Section 7 rights and convey to their workforce that they have no rights to organize or engage in activities for their mutual aid and protection. From a practical standpoint, misclassification both conceals available protections and chills concerted activity. It is difficult to imagine a clearer violation of Section 8(a)(1)—what interferes with, restrains, and coerces employees in the exercise of Section 7 rights more than an assertion that those rights do not exist?[5]

2. Board Cases Involving Misclassification and Work Rules Support a Finding that Misclassification Alone Violates Section 8(a)(1)

While the Board has not directly considered the question of whether misclassification is an independent violation of Section 8(a)(1), two Board cases addressing misclassification in other contexts support a finding that misclassification is an independent violation of 8(a)(1).

In *OS Transport*, supra. at 1053-54, the employer compelled its employee drivers to individually incorporate and sign independent contractor agreements, continuing to insist that they do so even after the drivers filed an RC petition with the Teamsters. The Board and the ALJ agreed that this forced incorporation was a sham and found that the employer violated Section 8(a)(1) when

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[3] The decision in *OS Transport* was subsequently vacated in light of the Supreme Court's decision in *NLRB v. Noel Canning*, __ U.S. __, 134 S.Ct. 2550 (2014). After remand, a reconstituted Board subsequently re-affirmed the original *OS Transport* findings and conclusions in *OS Transport*, 362 NLRB No. 34 (2015).

[4] NLRB "Frequently Asked Questions" https://www.nlrb.gov/resources/faq

[5] Congress intended Section 8(a)(1) to be interpreted broadly. During debates leading to passage of the Wagner Act, Senator Wagner himself, commenting on the overlap between Section 8(a)(1) and the more specific prohibitions of Section 8(a)(2) through (5), stated the latter were added "without in any way placing limitations upon the broadest reasonable interpretation of its [§8(a)(1)] omnibus guaranty of freedom." Hearings on H.R. 6288 Before the House Committee on Labor, 74th Cong., 1st Sess. 13 (1935) reprinted in *2 Legislative History of the National Labor Relations Act 1935* at 2487.

it told drivers that "if they were thinking about getting help from a union that it would not be possible because they were going to be the owners of their own companies." *Id.* Although the Employer in *Os Transport* explicitly vocalized the threat of futility, this exact same threat of futility is conveyed by the mere act of misclassification without the threat being vocalized. Knowing they are labeled independent contractors exempted from the Act and without any protections, individuals will be deterred from seeking union help.

In *First Legal*, 342 NLRB 350 (2004), the employer, in direct response to learning about an organizing campaign, required that all employees sign agreements stating they were independent contractors if they wanted to continue working. The Board and the ALJ agreed that this decision to reclassify, in response to protected activity, violated Sections 8(a)(1) and (3), reasoning that drivers:

> Instead of being employees, enjoying Section 7 rights, they found themselves treated as if they were nonemployees without any rights whatsoever. Not only did they lose their Section 7 rights, they also lost state protections such as unemployment insurance, workmen's compensation insurance, the right to complain to the State Labor Commissioner concerning wage matters and the like. This was no slight adjustment in position; it was a fundamental change of status.

342 NLRB at 362. This reasoning supports finding an independent 8(a)(1) violation in the instant case because the act of misclassification has the exact adverse result disapproved by the Board in *First Legal*, regardless of whether or not the employer imposed the misclassification directly in response to protected activity. Like the drivers in *First Legal*, the drivers in the instant case "found themselves treated as if they were nonemployees without any rights whatsoever." *Id.* There can be no greater interference with the exercise of rights than someone asserting you do not have those rights—no matter their motivation.

Moreover, the motivation of an employer committing an 8(a)(1) violation is of no moment. As the Board established long ago in cases like *Am. Freightways Co.*, 124 NLRB 146, 147 (1959), "interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer

engaged in conduct, which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." Here, there is no question that Velox's misclassification tends to interfere with the exercise of employees' rights in the same way that the conduct in *Os Transport* and *First Legal* did, regardless of the Employer's intent.

In addition, although the Board did not opine on this finding because no exceptions were filed, the ALJ in *First Legal* found an independent violation of Section 8(a)(1) by analogizing the independent contractor agreements that employees were required to sign with the infamous "yellow dog contracts" which prohibited unionization. 342 NLRB at 362-363. The Judge found that

> Instead of forcing the employee to affirmatively forswear unionization, the [independent contractor] agreements simply redefined these employees as something other than employees—independent contractors who by definition cannot enjoy the protection of the Act. The result was the same, employees were prohibited by agreement from engaging in union organizing activity. They were forced to relinquish the rights guaranteed them by §7 of the Act.

342 NLRB at 363.[6] This finding in *First Legal* is also directly applicable to the independent contractor agreements that Velox required its drivers to sign.[7] Because contracts that misclassify employees necessarily require employees to cede their statutory rights, they are violative of the Act.

Once Velox began operating the routes in question, it took actions which made it clear that its couriers were employees under the Act while attempting to maintain the fiction that they were independent contractors. *See* ALJD at 3. Velox promulgated many rules specifying how the couriers were to perform their jobs; did not allow couriers to choose substitutes unless it was with Velox's approval; required that the couriers be available to answer calls and respond to emails; and gave the couriers specific directions on job performance. ALJD at 3-4. Even the workers themselves

[6] See Norris-LaGuardia Act, 29 U.S.C. §103.

[7] *See also, J. I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944) (holding that "Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act. Wherever private contracts conflict with its functions, they obviously must yield or the Act would be reduced to a futility.") (quoting *National Licorice Co. v. Labor Board*, 309 U.S. 350, 364 (1940)).

recognized that Velox was treating them as employees (prompting Ms. Edge to complain about this misclassification). ALD at 4; Attachment A at 1-2. Despite this, Velox required that couriers sign and work under independent contractor agreements which, like the agreements in *First Legal*, "prohibited [the couriers] by agreement from engaging in union organizing activity" and had "the necessary impact of stripping them of their Section 7 right to form, join or assist a labor union." *Id.*

The requirement that drivers sign "take it or leave it" agreements misclassifying them as independent contractors, ALJD 2-3, is also a violation of Section 8(a)(1) when analyzed under the Board's recently narrowed approach to determining whether maintaining certain work rules violates the Act. Rather than relying on a "reasonably tends to chill" standard, the Board recently adopted a stricter standard that looks at (1) the impact a work rule maintained by an employer has on NLRA rights, and (2) the legitimate justifications associated with the rule. *Boeing Company*, 365 NLRB No. 154 (2017).

In our case, misclassification does not merely touch on NLRA rights: it completely eviscerates those rights for any employee who is misclassified. This means that Velox's rule requiring drivers to sign take it or leave it agreements purporting to strip them of their rights should fall under Category 3—in every instance, such a rule violates the Act because it will "prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule." *Id.* slip op. at 4.

Velox's rule, however, violates the Act even if examined under Category 2, which requires "individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications." *Id*. In this case, Velox had no legitimate justification for its rule requiring drivers sign agreements labeling them independent contractors. It is evident that Velox exercised pervasive control over the way the couriers performed their work, such that Ms. Edge specifically

pointed out to Velox that it was "micromanaging" the couriers as if they were employees. ALJD at 2-3. Rather than address this valid concern, Velox told Ms. Edge to "drop the employee crap" and, when she refused to do so, terminated her for speaking up and asserting her rights. ALJD at 5-6. These actions by Velox, and its decision to ignore direct evidence that it was violating the law, indicate that there was no legitimate business justification for its continued misclassification or for requiring that drivers sign agreements misclassifying them. Instead, misclassification was nothing more than an attempt to evade its responsibility under the Act and under other employment laws.

Thus, under both Category 3 and Category 2 of the new *Boeing Company* work-rule standard, Velox's work rule requiring that drivers sign take-it-or-leave-it agreements placing them outside the Act, violated Section 8(a)(1).

3. Arguments Against Finding Misclassification to be a Violation Fail

(a) Finding Misclassification to be a Violation Would Not Require Drastic Changes to the Act

Briefs in Opposition argue that finding misclassification to be a violation would be a drastic departure from the current interpretation of the Act. These claims are alarmist exaggerations. The answer to the Board's question is doctrinally simple and supported by statute and precedent. Thus, finding misclassification itself to be a violation would not involve a change to Board law at all.

The Act's prohibitions against restraining, interfering, or coercing employees are so plainly laid out in the statute that, doctrinally, misclassification has always been a violation of the Act. The Board has never considered the issue, in part because misclassification may never have been more prevalent than it is today, both in established and newly emerging sectors.[8] Misclassification has detrimental effects not only on employees who are deprived of their rights under labor and

[8] Jennifer Pinsof, *A New Take on an Old Problem: Employee Misclassification in the Modern Gig-Economy*, 22 MICH. TELECOMM. & TECH L. REV. 341, 352-53 (2016).

employment statutes, but also on law-abiding employers who have to compete with law breakers, and on both state and federal governments.[9]

The Briefs in Opposition also attempt to confuse the issue by mischaracterizing what "misclassification" entails. They make nearly nonsensical arguments based on the misconception that misclassification is imposed by Employer omission or passivity. They argue that the Board has never found a violation based on a threshold question without additional "action" or that the Board is improperly ignoring other factors and only relying on the "belief" element of the employee status test. These arguments are based on false premises.

Misclassification does not passively befall employers or employees. Misclassification requires discreet decisions and actions by the Employer. Specifically, it requires the employer to decide to label its workers independent contractors, yet not adhere to practices and policies that would ensure that that characterization comports with reality, i.e., that the contractor exercise true independence and entrepreneurial control.[10] Hence, misclassification requires the Employer to take affirmative actions to treat the workers as employees under the Board's common law test— by, for example, exercising control over those workers or constraining their exercise of entrepreneurial opportunity. Misclassification is therefore not just an abstract legal opinion or a threshold issue outside of the Employer's control—it flows directly from the employer's actions and decisions, its willingness to relinquish substantial control of the contractor, and its treatment of its workers under the common law employee status test.

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[9] *See Id.*; *see also Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal State Treasuries*, NATIONAL EMPLOYMENT LAW PROJECT Fact Sheet (July 2015) *available at* http://www.nelp.org/content/uploads/Independent-Contractor-Costs.pdf.

[10] There is no shortage of professional advice available to employers who genuinely wish to engage true independent contractors. See, e.g., https://ogletree.com/shared-content/content/blog/2017/december/contractor-misclassification-in-the-eu-what-companies-need-to-know-about-the-new-ecj-ruling (Ogletree Deakins lists 8 practical steps for businesses to take to avoid misclassification); .

In this case, Velox undeniably took action leading to the courier's misclassification. For example, it "promulgated many rules specifying how the drivers/couriers were to perform their jobs;" it decided that "drivers could not have more than one route that operated at the same time" and it did not allow drivers to choose substitutes without approval. ALJD at 2-3. These actions negate the Employers' argument that the Board is finding a violation without "action" from the Employer. They also negate the unformed argument that the Board is unfairly elevating the employee belief factor—neither the ALJ nor the Board would be relying just on the employees' belief to make a determination about misclassification; they will necessarily examine *every factor* to determine whether misclassification exists and, if it does, whether it violates the Act.

Finally, arguments regarding congressional intent are also unsupported by any evidence. It is undisputed that Congress intended to exclude independent contractors from the Act. This fact does not lead to a conclusion that Congress intended to allow employers to escape their responsibilities under the Act by misclassifying workers, however, or to a conclusion that the Board is ill-equipped to determine who functions as an independent contractor under the Act, or to a conclusion that Congress intended to limit the Board's interpretation of the common law test. Quite to the contrary, both the Board's long history of applying the common law to make employee status determinations, as well as a further finding that misclassification violates the Act, would fit squarely within Congress' intent. Such a finding would support the exclusion of *true independent contractors* by ensuring "that employees not be denied the protection of the Act through an undue extension of independent contractor status." *Yellow Cab Co.*, 229 NLRB 1329, 1333 (1977); *see also Holly Farms Corp. v. N.L.R.B.*, 517 U.S. 392, 399 (1996) ("[A]dministrators and reviewing courts must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach.").

(b) Finding Misclassification to Be a Violation Does Not Impermissibly Shift the Burden of Proof

The Briefs in Opposition similarly argue that recognizing this violation would impermissibly shift the burden of showing a violation from the GC to the employer. While it is true, typically, that the GC has the burden of proving a violation, the Board has found it proper to place the burden of excluding individuals from the Act on the party seeking such exclusion in order to ensure that workers are not unnecessarily denied the Act's protections.[11] As misclassification is a fundamental deprivation of rights, it would be proper for the Board to find that an employer's failure to carry the burden of showing that a worker should be excluded from the Act as an independent contractor is sufficient to establish a prima facie case of interference based on that misclassification.

The Board did not decide in a vacuum that the party claiming independent contractor status has the burden to prove that exclusion from the Act. The Supreme Court has long recognized that a "general rule of statutory construction [is that] that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefit." *Fed. Trade Comm'n v. Morton Salt Co.*, 334 U.S. 37, 44–45 (1948) (citing *Javierre v. Cent. Altagracia*, 217 U.S. 502, 507-08 (1910)). The Board has applied this principle to various exclusions under the Act in accordance with the Supreme Court's guidance, and at no point has Congress intervened to express its disapproval with the Board's reading of Supreme Court precedent or to change the long established allocation of the burden. Removing workers from the Act's protection through an exclusion is the pinnacle of interference, and placing the burden on the party seeking to erase that protection ensures that bona fide employees are not denied protection.

[11] See, e.g., *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711-712 (2001) (upholding Board rule that party seeking to exclude persons as supervisors bears the burden of proof); *BKN, Inc.*, 333 NLRB 143, 144 (2001) (party asserting independent contractor status bears burden of proof); *Allstate Insurance Co.*, 332 NLRB 759 (2000) (party asserting supervisory or managerial status bears burden of proof); *AgriGeneral L.P.*, 325 NLRB 972 (1998) (party claiming exemption of agricultural employees bears burden of proof).

Further, employers make the decision on how to classify their workers and structure their working relationship. As noted by an ALJ in a decision adopted by the Board with unrelated modification:

> [N]o cause appears for a departure from such a relegation of proof responsibility. The determination as to independent contractor status requires careful assessment of a myriad of factors, principally consisting of matters emerging from contracts and agreements solemnizing the relationship, statutes bearing thereon, and the particular employer's practice with respect thereto. Quite obviously, employers would be thoroughly conversant with such matters so fundamental to the relationship through which their economic interests are pursued. Thus, no unreasonable burden is imposed by placing the onus on them to affirmatively plead and substantiate such a defense on the basis of record proof.

Cent. Transp., Inc., 247 NLRB 1482, 1486 (1980).

Because it is not unreasonable to impose the burden on an employer to show that a worker should be excluded from the Act's protection, there is no unreasonable burden in taking the further step of saying that an employer's failure to carry that burden results in an 8(a)(1) violation. Once it is established that misclassification occurred, there is no need for the GC to make an additional showing—the misclassification itself inherently interferes with Section 7 rights.

Further, even if the Board finds that the burden remains on the GC to prove a violation, the GC easily carried that burden in this case. The GC presented three different drivers to testify about their employee-employer relationship with Velox. *See* Tr. 26, 184, 213. The GC also introduced 44 exhibits at the hearing. These exhibits ranged from the independent contractor agreement itself, GC Exh. 2, to detailed instructions given by Velox to its couriers, *See e.g.* GC Exh. 3, 5, 8, to notices of mandatory meetings for the couriers, GC Exh. 9. The Employer, on the other hand, did not introduce any driver witnesses supportive of its position —it merely re-called Ms. Edge and presented one employer representative. Under any formulation of the applicable burden—whether the burden is on the General Counsel completely or whether a burden shifting analysis applies—the testimony and documents presented by the GC are more than sufficient to prove that these drivers are misclassified and that the Employer violated the Act.

Thus, even if the Board were to find that the burden of proof is on the General Counsel, and that the ALJ did not acknowledge the GC's burden, it would be harmless because the GC presented more than sufficient evidence to carry the burden . Accordingly, regardless of the burden of proof, the ALJ's finding that misclassification violates the Act should stand.[12]

(c) Arguments Regarding the Slippery Slope of Worker Misclassification Should Not Receive Any Weight

The Chamber argues that finding misclassification to be a violation would chill employers from making business decisions about employee classification and lead to a deluge of unfair labor practice charges. These slippery slope arguments are pure speculation only meant to obscure the actual issue before the Board. This case is *only* looking at whether an employer's misclassification of a workforce as independent contractors interferes with that workforce's Section 7 rights. This case is not examining the exemptions for supervisors or for agricultural workers.[13]

While we can speculate as to whether some portions of this analysis may be relevant to a a separate case involving those other exemptions, each case will inevitably involve distinguishing factors that will change the analysis. For example, misclassification as independent contractors is typically a standardized process, with uniform take it or leave it agreements, systemically applied to an entire workforce. Supervisor classifications, on the other hand, are typically individualized and only involve one or two disputed individuals rather than entire workforces. In addition, individuals who are excluded from the Act on the basis of being agricultural workers have collective bargaining

[12] *See e.g*. *Teamsters Local 107*, 113 NLRB 524, 527 (1955) ("While we find merit in the Respondent Local 107's exception . . . it is clear from the foregoing that this error is immaterial to the result herein.); *W. Foundry Co.*, 105 NLRB 714, 715 (1953) ("As we find the Trial Examiner's primary findings and conclusions to be correct, we deem any possible error in these and other minor findings to be immaterial.").

[13] The Opposition Brief's (p. 13) argument that the independent contractor exemption should not be narrowly construed, while the agricultural employee exemption should be, is wrong and unsupported by law. Moreover, its citation to *Wilson & Co. Inc.* 143 NLRB 1221 (1963) for the proposition that a union may not "force" self-employed operators to join a union is erroneous. In *Wilson*, the Board condemned a CBA it held to be in violation of §8(e) of the Act, and the union's conduct in insisting on its violative terms, because it required the CBA employer party to hire union-represented employees. There was no allegation of union coercion of independent contractors in that case.

rights in many states that independent contractors do not have. Because any of these facts change the case-specific analysis, vague arguments about what might happen with other classifications should not carry any weight—the Board can address those issues if and when they are before it.

The slippery slope arguments about employers being chilled from making a business decision on how to classify workers should likewise not carry any weight. The truth is that nearly every business decision an employer makes carries a concurrent risk of litigation: every time it turns down a job applicant, it risks liability; every time it decides whether a worker is exempt from wage and hour laws it risks liability; every time an employer fires a worker, it risks liability.

In many cases, this liability is not based on intent—if an employer misclassifies an employee as an exempt worker in good faith and does not pay that worker overtime wages, the Employer will still be liable for paying those overtime wages to the employee. Yet, we do not see arguments that non-discrimination laws should be eliminated because they interfere with legitimate business decisions about how to hire or fire or promote. And no one would buy the argument that there cannot be liability for failure to pay overtime because it chills employers from making business decisions about whether employees are exempt. That decision about overtime wages has a significant impact on employees and employers risk some liability every time they classify a worker as exempt. Yet, these risks are accepted because they are inherent in being able to protect the employees who should actually be receiving overtime wages.

The same is true with misclassification. Purporting to deprive employees of their rights drastically interferes with those employees' rights and any small chilling effect on legitimate economic decisions is outweighed by the Board's obligation to protect the workers who should actually be protected by the Act. The biggest effect of the Board finding that misclassification violates the Act would be to chill misclassification, and that is exactly what the Board is meant to do. Thus, just like with every other business decision, the Employer must accept that it needs to be

conscious of the decision it is making, and obtain sound legal advice to accurately label independent contractors and employees as they truly are.

(d) Finding Misclassification to Violate 8(a)(1)Would Not Interfere with Free Speech

Free speech arguments are similarly specious for two reasons. First, assuming speech is implicated, finding a violation does not run afoul of Section 8(c) because the speech would be inherently coercive and threatening. Second, the facts at hand make clear that a violation is not based on "[m]erely telling workers how the Company seeks to structure its economic relationship." A violation would be premised not on such speech by an employer, but on the Employer's *actions* which result in the employees being misclassified.

Assuming for the sake of argument that speech is implicated in this case, this speech is not protected by Section 8(c) because it is inherently coercive and threatening. The very text of Section 8(c) recognizes that an employer's speech is not protected if it contains "threat of reprisal or force or promise of benefit." 29 USC § 158(c).[14] Even in the case cited by amicus for the proposition that 8(c) does not require "fairness or accuracy," the Board found the statements in question violated the Act and "given their context, exceeded the protection of Sec. 8(c) on grounds other than fairness, accuracy, or nastiness." *N. Star Steel Co.*, 347 NLRB 1364, 1373 fn. 13 (2006). As threatening statements fall outside Section 8(c), an employer cannot escape liability with vague claims about speech or legal opinions. If an employer tells an employee "it is my legal opinion that I can shut down the factory if you try to Unionize," that statement will violate the Act regardless of claims about legal opinions. Velox cannot be allowed to invoke these claims to escape liability in this case.

[14] "An employer may criticize, disparage, or denigrate a union without running afoul of Section 8(a)(1), provided that its expression of opinion does not threaten employees or otherwise interfere with the Section 7 rights of employees." *Childrens Ctr. for Behavioral Dev.*, 347 NLRB 35 (2006) (emphasis added).

Any speech or legal opinion implicated in this case is not protected by 8(c) or the First Amendment because it contains an inherent threat and fundamentally interferes with Section 7. It makes no difference that the threat is not explicit—implied threats are clearly sufficient to convert speech from protected statements under 8(c) to unprotected speech.[15] The same can be said about an employer's claim —oral or written—that its workers are independent contractors when those workers are actually employees under the Act. The preemptive assertion that these employees have no rights under the Act because they are independent contractors contains the inherent threat that the employees are unprotected—and therefore subject to termination—if they attempt to exercise the rights the Employer is claiming they do not have. This inherent threat is sufficient to take any speech component of the misclassification violation outside the purview of Section 8(c).

Further, this case should not even invoke Section 8(c) or Free Speech arguments because we are not dealing with a violation based just on employer's speech—despite claims to the contrary, this case is not just about a "legal opinion" being communicated to the workers. It is instead a violation based on an employer applying a legal label to a group of workers which strips those workers of their rights under the Act—that of independent contractor—while taking action to establish an employee-employer relationship and treat those workers as employees under the common law employee status test. Velox, for example, after labeling its drivers independent contractors, "promulgated many rules specifying how the drivers/couriers were to perform their

[15] *See Hornick Bldg. Block Co.*, 148 NLRB 1231, 1235 (1964) (Statement was "not a view, argument, or opinion protected by Section 8(c) but, under all circumstances of this case, amounted to a statement of intention by the president of the Company and an implied threat of economic reprisal.); *Hertzka & Knowles*, 206 NLRB 191, 194 (1973) (Statement "was not privileged by Section 8(c), but constituted an implied threat of employment loss, in violation of Section 8(a)(1) of the Act."); *see also Dal-Tex Optical Co., Inc.*, 137 NLRB 1782, 1787 (1962) (Overruling certain decisions because "[t]o adhere to those decisions would be to sanction implied threats couched in the guise of statements of legal position.").

jobs," did not allow drivers to have "more than one route that operated at the same time" and did not allow drivers to choose their substitutes without approval. *See* ALJD at 2-3.

It is these actions by the employer—treating workers like employees under the common law test, while unlawfully chilling their exercise of their Section 7 rights by claiming they are independent contractors who have no such rights—that manifests the violation. It is not merely the Employer's speech that is involved in this violation. The employer's actions leads to misclassification, and that misclassification leads to the violation. Just as an employer cannot escape liability by couching an unlawful termination in a legal opinion—the statement that "it is my legal opinion that I can cut your hours for talking to the Union" would violate the Act even though framed as merely an incorrect legal opinion—an employer should not be allowed to escape liability for the act of misclassifying by couching that act in claims about speech and legal opinions.

B. Employer's Misclassification Violates the Act In the Context of Other Unfair Labor Practices

As described above, there is abundant support for a finding that misclassification itself is a violation of Section 8(a)(1). If, however, the Board were to disagree, or to determine it did not have to reach that determination under the facts of the instant case, the Board should clearly find that misclassification violates the Act in the case at hand because it exists in the context of other unfair labor practices. This conclusion would be supported by the entire argument above, buttressed by the fact that the peril of misclassification—its interference with Section 7 rights—is amplified once workers engage in protected activity and see an Employer violating the Act by committing other unfair labor practices.

In other scenarios, the Board has recognized that the context surrounding certain actions or statements by an employer—and the existence of other violations of the Act in particular—can be the deciding factor in determining whether those actions or statements violate the Act. In *Forest Industries*, the Board adopted an ALJ's finding that the Employer—in the context of other

violations of the Act—violated Section 8(a)(1) by screening a certain film to its employees. *Forest Indus. Co.*, 164 NLRB 1092, 1094 (1967). In fact, the ALJ explicitly stated that he did "not deem it necessary . . . to here determine whether the screening of the film, standing alone, violates the Act." *Id.* In *Bandag*, the Board upheld, without discussion, the ALJ's finding that a statement that bargaining would start from scratch violated Section 8(a)(1). *Bandag, Inc.*, 225 NLRB 72 (1976). The ALJ stated that "[t]he legality of such a statement depends on the context in which it is uttered. In some instances, it has been regarded as an illegal threat; in other contexts, it has been construed to be merely a description of management's bargaining strategy." *Id.* at 83. In that case, the ALJ found it was a violation partly because of the "animus noted above from other statements of the Respondent, as well as other violations of Section 8(a)(1) ." *Id.*[16]

In all of those cases, the context and existence of other violations were part of what made the statements and actions a violation. It is critical to note, however, that none of the cases cited above utilized the existence of other violations to infer motive, as occurs under an 8(a)(3) analysis, and Charging Party is not suggesting the Board adopt some type of motive-based analysis for finding misclassification to be a violation of the Act. A discussion of motive is unnecessary because the very existence of other violations contributes to how an employee perceives certain statements or actions. So, an otherwise innocuous statement can become coercive in certain contexts because employees will be more aware of an Employer's capacity to commit those violations and that knowledge would intensify the chilling aspect of the statement or action. The instant case demonstrates that the same is true with regard to misclassification.

[16] *See also Yellow Cab*, 229 NLRB at 643 fn. 1 (Member Murphy agreed with the rest of the Board members that the Employer violated Section 8(a)(1), but clarified in a footnote that she found it to be a violation "when considered in the context of other violations of the Act." Otherwise, the statement might have been nothing more than a factual prediction supported by financial records. *Id.); Arakelian Enterprises, Inc.*, 315 NLRB 47, 62 (1994). (Board's analysis of whether interrogation violates the Act examines all the surrounding circumstances as other violations of the Act make it more likely that the interrogation was unlawfully coercive.)

In the instant case, the couriers' misclassification was not challenged in a vacuum. Soon after she began working for Velox, Ms. Edge realized that she was misclassified. She began to discuss this with her coworkers and eventually complained about their misclassification to the Employer, pointing out that the Employer's continued exercise of control was indicative of an employee relationship. Rather than address these concerns, Velox told her to "drop the employee crap" and terminated her in retaliation for her protected activity when she did not. ALJD at 5-6.

Even assuming employees are not chilled from exercising their rights just because they are misclassified, such further statements and violations of the Act by the Employer make that misclassification even more coercive. Seeing that the Employer has already terminated Ms. Edge for challenging her status, and the animus conveyed by the statement about "employee crap," other couriers would become more acutely aware of the risks of challenging the Employer's classification of couriers as independent contractors. Even if they believe they are truly employees who have rights, their misclassification would interfere with the assertion of these rights when they just saw their co-worker terminated for asserting the couriers' rights.

Thus, the chilling effect of misclassification becomes tangible in the context of other violations of the Act by an employer, particularly in the case at hand. Therefore, even if the Board does not find that misclassification violates the Act on its own, or finds that it does not have to address that issue in the instant case because of the context of other unfair labor practices, the Board should nevertheless find that misclassification violates the Act here, where the Employer has engaged in other related unfair labor practices.

C. Any Remedy for Other Unfair Labor Practices Must Include Reclassification

Finally, if the Board does not agree that misclassification can ever be an independent violation of Section 8(a)(1), or that it does not need to address the issue here , then at the absolute minimum the Board should clarify that the remedy for any unfair labor practice involving an

employee misclassified as an independent contractor *must* include an order to cease and desist from misclassifying and an order to classify the misclassified workers as employees. This is because, regardless of whether misclassification violates the Act, an acceptance of employee status is necessary to properly remedy any unfair labor practices that are found.

Such a finding by the Board would fit squarely within the Board's broad authority to order such relief as is necessary to remedy a violation. *See United States Postal Serv.*, 211 NLRB 727, 730 (1974) (ALJ, in decision adopted by the Board without discussion, recognizing "that the Board has broad remedial powers under Section 10(c) of the Act to eliminate the effects of violations"). In other contexts, the Board has used this broad authority to order more expansive relief than the violations would typically call for in order to ensure that the violations were fully remedied. In *Peaker Run Coal*, 228 NLRB No. 16 (1977), for example, the Board issued a bargaining order even though it did not find a 8(a)(5) violation because that order was necessary to fully remedy the 8(a)(1) and (3) violations.

This clarification of the proper remedy in cases involving independent contractors is necessary because only employees have rights under Section 7, and Board remedies are typically applicable only to employees. Therefore, once an ALJ or the Board finds that unfair labor practices were committed against any worker who is misclassified as an independent contractor, the Board should order the employer to affirm the status of those employees. The problem with failing to include this in the Board order can be seen in the *Pacific 9 Transportation* advice memorandum. In that case, the employer agreed to a settlement after the Region determined that it had misclassified its employees and committed unfair labor practices. The Employer agreed to post a "Notice to Employees" as a remedy. After doing so, however, the Employer told its misclassified drivers that they were not employees—despite the Region's determination—and that the notice posting did not

apply to them. *Pacific 9 Transportation*, Case 21-CA-150875, Advice Memorandum dated December 18, 2015.

This utter disregard for the Board's order becomes a possibility in any case involving misclassified employees. If not forced to acknowledge and remedy its misclassification, any Employer could claim that any remedy ordered by the Board is not applicable to the very misclassified workers against whom the violations were actually committed. The best way to prevent that is to include cease and desist and reclassify language in any case finding a violation against employees who are misclassified. A recent ALJ decision in *SOS International* demonstrates this approach. Judge Rosas found that the Employer misclassified its interpreters and committed numerous unfair labor practices. Although he did not find that misclassification is an independent violation of the Act, Judge Rosas did order the Employer to

> Take whatever steps are necessary to reclassify its interpreters that work at the EOIR locations nationwide, pursuant to the EOIR contract with SOSi, and treat them as employees rather than independent contractors, including rescinding any portions of the Independent Contractor Agreements and other documentation Respondent requires them to complete that purports to classify them as independent contractors.

Sos Int'l, LLC, 21-CA-178096, 2018 WL 1292639 (Mar. 12, 2018). Although the Judge does not discuss this portion of his order, the logical inference is that the Judge realized that none of the other remedial orders would have any practical effect without making it clear that the interpreters were misclassified. This is also where it is worth emphasizing the limited nature of this order—limited, as it would be, to reclassifying employees *for purposes of the Act*.

IV. Conclusion

For the above-cited reasons, Charging Party respectfully requests that the Board affirm the ALJ's finding that Velox violated the Act by misclassifying its couriers as independent contractors when they were employees within the meaning of the Act. Alternatively, even if the Board does not find that misclassification itself violates 8(a)(1), or that it is unnecessary to reach that issue in the

instant case, the Board should find that Velox violated the Act because the misclassification existed in the context of employees engaging in protected activity and Velox committing other ULPs.[17] Finally, regardless of whether the Board chooses to address the issue of misclassification is an 8(a)(1) in the instant case, at absolute minimum, the Board should find that a remedy that includes reclassification and a cease and desist order is appropriate in the case at hand where the ALJ has properly found that the Employer engaged in unfair labor practices against drivers misclassified as independent contractors.

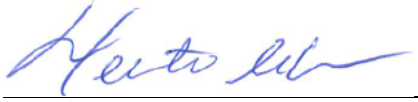
DATED: April 30, 2017

Respectfully submitted,

JULIE GUTMAN DICKINSON
HECTOR DE HARO

BUSH GOTTLIEB, A Law Corporation
Attorneys for JEANNIE EDGE, Charging Party

By: 
JULIE GUTMAN DICKINSON

By: 
HECTOR DE HARO

[17] Alternatively, as the GC argues in its brief, filed April 25, 2018, the Board should find that here, where Respondent actively used misclassification to interfere with Section 7 rights, it violates Section 8(a)(1) of the Act.

To the NLRB Board:

I am writing to answer the question that you have asked: "In what circumstances, if any, should the Board deem an employer's act of misclassification of statutory employees as independent contractors a violation of Section 8(a)(1) of the Act?" I am not going to try to answer as an attorney, because I am not one. I am approaching it from a unique perspective they don't have . . . as a misclassified worker who saw how the classification alone affected my coworkers and me.

Based on my past experience as both a true IC (independent contractor), and as an employee who was misclassified as an IC, let me begin by stating that as soon as an employer takes the action of misclassifying and telling workers they are an IC, the Act has already been violated. By telling workers they are an IC (orally or in writing), they are being told they have no rights or protections under the Act, by the very definition of an IC. What better way to keep them in line and "under control" if they have already been told they have no rights because they are an IC? What better way to constrain their exercising their Section 7 rights? Just take them away up front – call them an IC.

Those of us who have worked as an IC understand that the rights and protections of an employee are not ours due to what an IC is. Real ICs are not employees so we should not be treated as such – nor do we get the benefits of being one. We take the job of an IC with that understanding. We also expect to run our own business, negotiate pay, hire our back up drivers and all the freedom and responsibilities that go with it. At Velox, it became evident very quickly that we have none of the freedoms of running our own business and were treated as employees with no control.

Some of us realized we were misclassified within a day of working with the company. As the Judge found based on the testimony of me and my coworkers, we had to wear Velox uniforms and follow Velox's rules for how to do our job. We could not hire our own replacements. We could not negotiate our pay. And we even had to ask for permission to take a day off. To us at Velox, the main thoughts were that calling us an IC was no more than a title; where others believed it was a

loophole that allowed the company to make more money by making the IC pay all the taxes due for both them and the company. Then there were those who thought it was just another classification of employee without benefits. My co-workers and I believed and knew we worked FOR Velox – not that we had our own business and were CONTRACTED TO Velox.

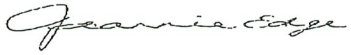
When Bret Woods, Jill Cross, and at least 5 others, and I would discuss the situation, the prevailing thought was we could not speak up because we are classified as IC's so we have no rights. I was the only one who spoke up, knowing I may lose my job, but I did it in an attempt to make things right for all us employees. Now, I frequently get calls or texts from current employees of Velox asking questions about their situation, telling me what is happening with them, and updating me on things in the company. These are people who know they are not really an IC but they refuse to speak up because of their misclassification. I asked one employee a couple of weeks ago, "If they removed the classification of IC, would you feel free to speak up and take action?" He answered, "Most definitely! As long as I am classified as an IC I have no rights and can't do anything about it." I don't want to put his name in here as he is afraid of losing his job, especially after I lost my job when I spoke up.

This is an excellent example of how misclassifying employees "chills" the rights accorded them by Section 8 (a) (1). The Act is meant to protect the right to meet and find solutions to the issues on the job. It begins with talking, sharing, researching, educating each other and seeking solutions, as we did. This might lead to seeking legal help, NLRB help, or even unionization. These are the rights we were told we didn't have just by misclassifying us without any other action. Now the employees of Velox are not exercising these rights or taking action to improve their working conditions, as they have been classified as an IC and they know that means they have no rights. What better way to "chill" their future efforts under the Act than by classifying them as such and using it to keep them in line and doing what they are told?

It is my belief that it is one thing to try to interpret the law and decide how it should be applied, but it is another to live it and experience it. When you experience it you know firsthand what is happening. You know you are not supposed to have rights when you are told you are an IC, therefore, you are afraid to speak up or take any action. You take the abuses of the company because you feel you have to. You don't speak up out of fear of losing your job. You can't just quit with the job market what it is today, as you can't afford to be unemployed for any length of time. Therefore, you feel you are stuck with no recourse.

I lost my job for speaking up and the current employees at Velox won't speak up because they are classified as ICs. I am hoping now that the Board will do the right thing so misclassified workers don't have to fear that they too will lose their job if they speak up like I did. The Board needs to find misclassification itself violates the Act so we don't have to wait for something bad to happen to call it a violation. Most workplaces are not going to have someone like me present who will stand up and risk being fired. They will just suffer in silence. I have lived it, seen it, and know firsthand how harmful it is to misclassified workers, and am positive that classifying someone as an IC keeps them from pursuing their rights under the Act.

My last thought is this: How is it possible that an employer can misclassify employees without violating the Act when the act of misclassification chills their Section 7 rights? The employees at Velox are keeping quiet due to misclassification. This is one company in many thousands doing it. Just imagine how many workers are in this position feeling they have no recourse because of the classification. Should the financial gain to the company come before the worker and his rights? Or should the Board protect employees and make sure they have the ability to speak up to improve conditions? I urge you to think about us-the misclassified workers-and to find that the very act of misclassification violates the Act.

Thank you, Jeannie Edge  DATED: 04/30/2018

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2018, a copy of the **CHARGING PARTY'S SUPPLEMENTAL BRIEF** was electronically filed via the NLRB e-filing system with the National Labor Relations Board and served, via email, upon the following participants identified below:

Mary E. Eade
E. Rachael Dahlman Warf
Benjamin C. Fultz
Fultz Maddox Dickens PLC
101 S. Fifth Street, 27th Floor
Louisville, KY 40202
Counsel for Respondent

Electronic mail
meade@fmdlegal.com
rwarf@fmdlegal.com
bfultz@fmdlegal.com

Harry I. Johnson, III
Morgan, Lewis & Bockius LLP
2049 Century Park East, Suite 700
Los Angeles, CA 90067
Counsel for Amicus Curiae

Electronic mail
harry.johnson@morganlewis.com

Julia S. Sturniolo
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103
Counsel for Amicus Curiae

Electronic mail
Julia.sturniolo@morganlewis.com

A. Jack Finklea
Prasad Sharma
Scopeletis, Garvin, Light,
Hanson & Feary, P.C.
10 W. Market Street, Suite 1400
Indianapolis, IN 46204
Counsel for Amicus Curiae

Electronic mail
jfinklea@scopelitis.com
psharma@scopelitis.com

Cory L. Andrews
Marc B. Robertson
Washington Legal Foundation
2009 Massachusetts Avenue, NW
Washington, D.C. 20036
Counsel for Amicus Curiae

Electronic mail
candrews@wlf.org
mrobertson@wlf.org

Kathleen McKinney
Linda Mohns
National Labor Relations Board
F. Edward Hebert Federal Building
NLRB Regional Director, Region 15
600 South Maestri Place, 7th Floor
New Orleans, LA 70131-3413
Counsel for the General Counsel

Electronic mail
kathleen.mckinney@nlrb.gov
linda.mohns@nlrb.gov
smo-region15-neworleans@nlrb.gov

Jeannie Edge
310 E. Woodruff
Sherwood, AR 72120

Electronic mail
Jmedic35@yahoo.com

Nelly Guzman